

FOR ARGUMENT

97-1625

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

California Dental Association,

Petitioner,

SHELF COPY

v.

Federal Trade Commission

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**OPPOSITION OF CALIFORNIA DENTAL ASSOCIATION TO MOTION FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CONSUMER DENTAL
CHOICE PROJECT OF THE NATIONAL INSTITUTE FOR SCIENCE, LAW AND
PUBLIC POLICY, INC.**

The California Dental Association ("CDA") respectfully submits this opposition to the motion of the Consumer Dental Choice Project of the National Institute for Science, Law and Public Policy, Inc. (the "Project") to file a brief *amicus curiae* in this case. CDA declined the Project's request to consent to the filing because CDA believed that the Project's *amicus* brief would fail to raise relevant matter not already addressed by the parties, as required by Supreme Court Rule 37.1, and, based on prior experience, CDA believed that the Project would likely include in its brief irrelevant and scandalous matter in violation of this Court's Rule 24.6. A review of the Project's motion and brief confirms CDA's concerns.¹

¹ The Project complains that CDA "has not consented to a single *amicus* on the other side." Mot. ii. However, the Project is the only entity that has requested CDA's consent. The only

I. THE PROJECT'S BRIEF FAILS TO RAISE RELEVANT MATTER NOT ALREADY ADDRESSED BY THE PARTIES

The Project's motion identifies three matters raised in its *amicus* brief. Each matter has either been raised by the parties or is irrelevant to the questions before the Court. First, the Project states that it will argue that this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), "demolished" the so-called "learned profession" exception to the antitrust laws. Mot. ii. CDA does not argue that there is such an exception. Indeed, citing *Goldfarb*, CDA admits that it is subject to the Sherman Act. Pet. Br. 26, n.8. Moreover, the government devotes a whole section of its brief to this argument. Resp. Br. 23-25.

The Project also asserts that it will argue that the Federal Trade Commission's jurisdiction has already been decided "*sub silentio*" and "there really is no conflict in the Circuits." Mot. ii-iii. This issue is also fully aired in the government's brief. Resp. Br. 20-22. The Project's proposed brief fails to bring any different or unique perspective to either of these two issues.

Finally, the Project asserts that it will "point out" certain alleged anticompetitive practices of the American Dental Association ("ADA") and "sister state dental associations." Mot. iii. This issue is wholly irrelevant to the questions before the Court. The ADA is not, and has never been, a party to this case. Nor is any "sister" state dental association a party. The only parties in this litigation are CDA, a wholly independent legal entity, and the Federal Trade Commission. As the Project's motion makes clear, its unfounded assertions of anticompetitive practices relate to the use of certain dental filling materials. Such alleged conduct has never been an issue in this case at any stage. This case is confined to the narrow issue of CDA's advertising

other *amici* on behalf of the Respondent are 27 states, which under this Court's rules may file without the consent of either party. SUP. CT. R. 37.5.

guides relating to price and quality, a world removed from the scurrilous and unfounded allegations in the Project's proposed brief.

The Project has ignored this Court's admonition that an *amicus* brief which fails to raise relevant matter not already raised by a party "simply burdens the staff and facilities of the Court and its filing is not favored." SUP. CT. R. 37.1

II. THE PROJECT'S BRIEF RAISES IRRELEVANT AND SCANDALOUS MATTERS IN VIOLATION OF THIS COURT'S RULES

The Project's real purpose in seeking to file its *amicus* brief is apparent from the fact that almost one-half of its argument is devoted to a diatribe against the ADA, who is not a party to this litigation, on a matter that lacks even the remotest connection to any issue before the Court. Project Br. 11-14. The Project devotes three and one-half pages to unsupported allegations about ADA's alleged anticompetitive practices. The Project's principal complaint against ADA apparently relates to ADA's alleged position on the use of certain dental filling materials. Not only does the Project raise this irrelevant issue as to a non-party, it casts unfounded aspersions against ADA's motives and integrity. It refers to ADA as an "economic colossus" engaged in a "massive anticompetitive campaign" to "drive nonmember dentists out of business." Project Br. 11-12. These reckless and irresponsible assertions are made without any effort to provide factual support -- because no such support exists. Moreover, as a nonparty, ADA is unable to respond to these charges. It is apparent that the Project simply seeks to use this Court as a forum to vent its ill will against ADA.

The Project has blatantly disregarded this Court's requirement that all briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." SUP. CT. R. 24.6. This Court has warned that briefs that fail to comply with these requirements "may be disregarded and stricken by the Court." *Id.*

Conclusion

The Project's proposed brief makes no effort to comply with this Court's Rules 24 and 37. Therefore, CDA respectfully requests that the Court deny the Project's motion to file its brief *amicus curiae* in this matter.

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